1989

Deanna Foxley v. William N. Foxley : Reply Brief

Utah Court of Appeals

Greg S. Erickson; Attorney for Appellant.
Robert Wallace Hughes; Attorney for Appellee.

IN THE UTAH COURT OF APPEALS

DEANNA FOXLEY	:	
Plaintiff/Respondent,	:	APPELLANT'S RESPONSE TO RESPONDENT'S BRIEF
v.	:	Case No. 890493-CA
WILLIAM N. FOXLEY	:	Appeal from the Third Judicial District Court
Defendant/Appellant	:	Hon. Richard H. Moffat

BRIEF OF DEFENDANT/APPELLANT
APPELLANT'S RESPONSE TO RESPONDENT'S BRIEF

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IN RESPONSE to Respondent's Brief, Appellant would make the following Arguments.

I

DISPUTED FACTS

A. Appellant admits the parties were married for seven (7) years.

The Appellant's statement in his Brief was that the parties lived together for five and one-half (5 1/2) years before separating.

B. Respondent voluntarily did not increase her work.

Respondent argues form over substance of the evidence at trial. The representation of the dialogue by Respondent is

accurate.

C. Appellant's income is disputed.

1. Both parties are in disagreement over Appellant's 1987 income.

Because both parties are using the same document, i.e. Appellant's 1987 income tax return. The actual income after deduction for business expenses is $72,166.

The issue is what figure should be used to plug into the Uniform Child Support Schedule for Appellant's income.

Appellant would argue that a figure that nets out reasonable and ordinary business expenses is the one that should be used.

2. Trial of this matter commenced in September, 1988 and concluded in March of 1989.

At the time of trial, Appellant's accountant had not completed his income tax returns for 1988 nor was it due (TR2:12-15). Respondent tries to imply that Appellant was attempting to hide his income which is not the case.

The Court found that Appellant's income was as high as $224,000.00 per year.

Appellant would assert that this figure was pulled out of thin air.

Respondent's references to Appellants income are made from self imposed deductions which are in conflict with the express testimony of Dr. Foxley and the record.

Respondent states that Dr. Foxley earned $112,358 from his Winslow practice and cites (TR2/106:12-15).

When page 106 of TR2 is read, it is clear that he earned $90,000.00 from the Winslow practice.

The income figures in the Findings of Fact have no basis.

D. Respondent testified that he would shortly pay $75,000.00 per year for liability insurance (TR107:18-19) and represented in his brief that the $75,000.00 was an estimate.

Appellant cannot see Respondent's point but would argue that his testimony that his insurance carrier, Mutual Insurance Company of Arizona, was significantly increasing liability insurance for an Obstetrician should not come as a great surprise, and is properly included as evidence of Dr. Foxley's ability to pay.

Liability insurance should be properly be deducted from gross earnings as a business expense.

II

ADDITIONAL FACTS

The additional facts added to Respondent's Brief were part of Respondent's testimony concerning pre-divorce issues. The pre-divorce items were admitted over Appellant's objection.

The Respondent uses net figures on tax returns 1983-1986 but for 1987 goes to a gross figure, without business deductions. Again, this is inaccurate and inconsistent with the

approach used for the other years. The 1987 figure should be $72,166.

III

SUMMARY OF APPELLANT'S RESPONSE

A. Pre-Divorce issues should have been excluded and not made part of the Findings.

The trial court ruled that it would not rely on the doctrine of equitable restitution, therefore, pre-divorce issues should not have been considered or made part of the Findings.

B. The increase of alimony from $10.00 to $1,350.00 per month should be reversed.

Due to the short marriage of the parties, the establishment of a yearly income level for Respondent of $45,456.00 was an abuse of discretion, not in line with Utah case law of the reasons for alimony, and a windfall to Respondent of $21,456.00 per year over the income needed to meet her expenses.

The award of alimony in the amount of $16,200 per year is an abuse of discretion not supported by the evidence.

C. The trial court's Findings are not supported by the evidence.

The Respondent has not been accurate in the designation of Appellant's 1987 income. It is the 1987 income figure that was used to establish the estimates for Appellant's future

earnings, which are also in error.

Using the same method as Respondent used to calculate Appellant's income from 1983 through 1986, Appellant should have income for 1988 of $72,166.00

The figures used by the Respondent and the Court in establishing the figure of $6,985.00 per month used as the basis of Appellant's child support obligations are nowhere to be found in the record.

The child support award should be reversed.

D. The Court committed reversible error in awarding an increase of child support to $1,547.00 per month increasing to $1,638.00 per month.

The child support worksheet is hearsay under Rule 801(a) and (b) of the Utah Rules of Evidence and not excepted by Rules 802 and 901.

Because a proper foundation was not laid to introduce the worksheet and because the worksheet was hearsay introduced and submitted after the trial of this matter, the Court should reverse the award of the District Court which predicated child support on this worksheet.

At the minimum, child support should be set at $1,044.00 per month based on the worksheet submitted by Appellant.

E. The Court erred in not giving Appellant's Motion for Directed Verdict.

F. The Court committed reversible error in awarding respondent attorney's fees.

Respondent argues that a District Court can take judicial notice of the amount of attorney's fees it awards to a party which were submitted ten (10) days after the close of trial.

Article II Rule 201(b) Utah Rules of Evidence outlines the requisites for judicial notice.

Because of the nature of attorney's fees and because the record does not support the Respondent's notion that the Court took judicial notice, the argument of Respondent must fail and attorney's fees must be reversed.

G. The Court should have found Respondent in contempt of court and either dismissed her case or awarded Appellant a new trial.

After the trial Appellant presented new evidence to the trial that the Respondent had committed perjury.

These accusations included the fact that the Respondent had purchased an interest in an airplane for $4,500.00 when she told the Court at trial she could not pay her mortgage or property taxes.

The evidence also includes allegations of an undisclosed bank account, $19,000.00 expenditures to fix up her home and the purchase of a new home.

The Court dismissed Appellant's motion without further evidentiary hearing or inquiry.

Most of these allegations are not denied but Respondent argues they are harmless error.

Appellant argues that it was reversible error not to dismiss Respondent's petition or grant him a new trial.

H. Judge Moffat should have been recused for allegations of prejudice in an affidavit submitted by Appellant.

IV

ARGUMENT

A. Pre-Divorce Issues should have been excluded.

The Court ruled from the onset of the hearing that it would not use the elements stated in Martinez v. Martinez, 754 P2d 69 (Utah App 1988).

Because of this ruling a full evidentiary hearing on pre-divorce matter was avoided including evidence that Mrs. Foxley had attempted to get Dr. Foxley kicked out of medical school proferred by Appellant but rejected by the Court.

Appellant argues that the trial court's mind-set was to award the Respondent equitable restitution and to legitimize that award under the broad discretion of change of circumstances analysis.

The initial draft of factual findings contained a plethora of pre-divorce factual matters.

Although amended, they still include pre-divorce facts which are not harmless error, but a basis for the alimony increase, which is an abuse of discretion.

B. Increase of alimony from $10.00 to $1,350.00 per month should be reversed.

1. Respondent has erred on page 8 of her Brief.

The original decree did not provide the language as emphasized.

This language was replaced and signed by Judge Conder (see original Decree of Divorce in the record).

2. Respondent in her response merges child support and alimony issues.

The point that is made by Appellant and not addressed by Respondent is that the evidence does not support the level of alimony and child support set by the Court.

The Court found that Respondent makes about $9,600.00 per year (Finding 22), awarded her alimony of $16,200 per year and child support of $19,656 for a yearly income level of $45,456.00.

Nowhere is there a finding as to what she actually needs in terms of dollars and cents that corresponds to the award given. No figure was presented nor was there sufficient evidence presented for the Court to deduce such a figure.

The Respondent's testimony was that she would spend $2,000.00 per month at a desired standard of living (TR2/80:11), leaving a windfall of $21,456.00.

This figure does not take into consideration that she is only working part-time, that she has her bachelor's degree and was to receive her Master's Degree in sociology in May of 1989.

Appellant recognizes that alimony is more than a mechanical award of dollars, but in turn, argues that such an award must be consistent with evidence offered and the purposes of alimony as enumerated by the Utah Supreme Court.

Currently there are three branches of alimony under Utah law.

The first line of cases attempts to maintain the wife at a standard of living that she enjoyed during the marriage, English v. English, 565 P2nd 409 (Utah 1977).

Clearly the parties were in a financially depressed state and this criteria is inappropriate.

The second line of cases is the emerging area of equitable restitution, Martinez (supra), which the trial court ruled would not be considered.

The third line is to rehabilitate the spouse so as not to become a public charge, English (supra), Gramme v. Gramme 587 P2d 144 (Utah 1978), and in the case of long term marriage, some permanent award Jones v. Jones 700 P2d 1072 (Utah 1985), Olson v. Olson 704 P2d 564 (Utah 1985).

The marriage of the Foxleys, unlike case authority cited by Respondent, is a very short one. The parties lived together for only 5 1/2 years and were divorced after 7 years. Further, the Respondent testified that she pulled herself off welfare in 1984, earned a Bachelor's Degree in 1984, would earn a Master's Degree in May, 1989. She lost her part-time job and refused to increase her hours at her other part-time job.

Appellant does not argue that Respondent has not presented that she has needs. The Court on the other hand should not supplement Mrs. Foxley because she chooses to buy an interest in an airplane for $4,500.00 instead of paying her mortgage, property taxes and buying milk for the children.

Absent proper pleadings and evidence that she is entitled to equitable restitution or some other form of relief which should have been presented at the initial trial in 1983, the Court abuses its discretion to set a standard of living which now allocates the Appellant's 1989 income without any basis and which is $21,000.00 over her required standard of living.

This court should reverse the alimony award to Respondent or at the minimum have the trial court set the level of need in terms of dollars and cents consistent with Respondent's testimony of need and prospective future earnings.

C. The trial court's findings are not supported by the evidence.

1. Respondent is inconsistent and inaccurate in income figures she presents in her Brief which is the basis for Appellant's numerous foundational objections.

For example, on page 3 of her Brief, Respondent represents that Appellant earned $112,358.

The accurate figure is correctly represented on page 25 of her brief at $90,000.00.

The point is that Respondent submitted a child support schedule after her case was closed without foundation based on inaccurate figures that she still uses in her brief, and which have absolutely no foundation in the record.

2. Finding No. 17 is still without foundation or support in the record.

The $112,000.00 figure for 1987 was a gross figure before deduction for business expenses which was Respondent's trial exhibit No. 7.

Clearly on Schedule C, it shows that Appellant incurred business expenses, insurance, office expenses, etc., leaving him actual income of $56,087.00 plus $16,031.00 for a total of $72,166.00.

The trial court apparently doubled the $112,000.00 gross figure without any questions being asked to establish Appellant's income for 1988.

The Respondent then did not compute or place into the record business expenses that should be discounted.

It is not equitable to peg Appellant's income at a gross figure that does not deduct his normal business expenses for office help, insurance, etc.

3. Finding No. 21 - Child Support Schedule.

Where is the figure of $6,985.00 per month as the Defendant's adjusted gross income in the record? It is not, nor are there any figures in the record that could be added, subtracted, multiplied or divided to arrive at that figure.

Where is the deduction for Defendant's health insurance contribution for the children that is clearly in the record (TR2/101:17-21).

The Respondent submitted the Child Support Schedule after the case had been closed, using figures not in evidence and without foundation or basis. As a result, the award should be reversed.

D. The Court committed reversible error in awarding Respondent child support in the amount of $1,547.00 per month, which subsequently increased to $1,638.00 on April 15, 1989.

1. There was no competant evidence introduced to support the child support increase.

The Appellant concedes that his income increased significantly since the time of the divorce.

The Respondent goes far afield by advancing the proposition that the child support worksheet is not evidentiary and subject to the same foundational and other requirements of the Rules of Evidence.

The issue is what dollar figure the Court should have plugged into the child support worksheet to arrive at a monthly child support amount and whether the child support worksheet was admissable into evidence.

The authority for Appellant's objection is elementary.

Domestic hearings are subject to the Utah Rules of Evidence, Rule 101 and Rule 1101

The worksheet is hearsay under Article VIII Rule 801(a) and (b).

The worksheet contains a written amount that purports to be the Appellant's net income as defined by the Uniform Child Support Schedule instructions.

It was offered for the purpose of determining how much child support the Appellant would pay.

There was no foundation offered as to where the figure used by the Respondent came from.

It would appear that an income figure on a child support schedule wouldnot come within the exceptions offered under rule 803 or 901 Utah Rules of Evidence.

The Respondent argues that a copy of the child support schedule was filed prior to trial attached to a memorandum as well as after the close of trial.

This position is apparently in response to the trial judge's position "...well, I suppose under the rules, he can file those guideline worksheets any time you want to..." (TR2/112:23-24).

What rules the judge refers to are unknown.

The Respondent filed various pleadings which contained prayers for child support.

March 22, 1985	$1,000.00 child support
March 6, 1986	900.00 child support
February 26, 1988 (Memorandum)	1,600.00 child support
September 15, 1988 (Memorandum)	1,858.14 child support

Attached (Exhibit "A") is a copy of the schedule attached to Respondent's September 15, 1988 Memorandum, which she apparently refers to in her Brief as the one filed before trial, which is different than the one filed after trial.

It was the one that was filed after trial, that apparently is the one the trial court adopted.

Even the dollar figures used in Respondent's Brief do not jive with the Amended Findings of Fact signed by the Court.

Trial Exhibit No. 7, which is attached as Exhibit "B" in Respondent's Brief, shows that Appellant earned $72,166.

Where the Court and the Respondent came up with $120,000.00 per year is unknown and certainly not supported by the record or even used in Respondent's child support worksheet submitted after the trial ended.

Respondent argues in her brief that her part-time income is $600.00 per month. Finding No. 22 of the Amended Findings of Fact indicate that the Plaintiff/Respondent had adjusted gross, part-time income of $800.00 per month and that Defendant/Appellant had adjusted gross income of $6,985.00 per month.

Where the Respondent and Court deduced that figure is similarly a puzzle.

The Uniform Guidelines require that the obligor get a credit for health insurance.

There is unrefuted evidence that the Appellant pays $375.00 per month in health insurance, which the Respondent chose not to include in its worksheet (TR2/101:17-21)

The Court clearly erred in allowing the worksheet to be submitted after trial while using it as the evidence that it used to set child support.

The Court should have granted Appellant a directed verdict after Respondent rested.

At the minimum, the Court should have set child support at $1,044.00 per month which was the only competant evidence before the court (TR2/103:1-3).

The case of Naylor v. Naylor 700 P2d 707 (Utah 1985) does not help the Respondent because it is clear from the Amended Findings that the Court was using the Uniform Child Support Schedule to set child support (see Amended Findings No. 21, 22, 23, 24, and 25).

E. The Court erred in not granting Appellant's Motion for Directed Verdict.

For reason as outlined in both Appellant's initial Brief and this Response, the Court should have granted Appellant's post-judgment motion.

F. The Court committed reversible error in awarding Respondent Attorney's Fees.

Appellant submits that he is on sound ground in requesting a reversal of the award to Respondent of Attorney's fees.

Respondent's only argument is that the award is supported by judicial notice.

Nowhere does the record support a Finding that the trial court took judicial notice of the elements that Respondent was required to establish Talley v. Talley 739 P2d 83 (Utah App

1987).

Article II Rule 201(b) Utah Rules of Evidence outline the requisites for a judicially noticed fact.

First, they must be a fact generally known within the territory and second, capable of accurate and ready determination by a resort to sources whose accuracy cannot be reasonably questioned.

The Rule further provides for an opportunity to be heard.

In this case, there is nothing in the record to support that the Court took judicial notice of respondent's attorneys' fees.

Further, because of the elements that go into the determination of attorney's fees, they are not items that are susceptible to judicial notice and should be reversed.

G. The Court should have found Respondent in contempt of Court and either dismissed her case or awarded Appellant a new trial.

After trial the Appellant discovered evidence that alleged that the Respondent had kept a second bank account without disclosing it, had purchased an interest in an airplane for $4,500.00 without disclosing it, and all the while telling the Court that she could not pay her mortgage or property taxes.

Further, the Respondent promptly bought a new home after the trial and after she sent a bill to the mortgage holder for some $19,000.00 she claimed she expended on the home that, at

trial, she claimed she had no money to repair.

The Respondent denies none of these facts in her Brief. She relies on the trial Judge's response that he was not convinced.

It was an absolute abuse of discretion and travesty to the judicial system in Utah not to take some form of action concerning these allegations.

At the very least, the Court could have held an evidentiary hearing to investigate these charges and extended Appellant thirty (30) days to complete his investigation.

H. Judge Moffat should have been excused.

Attached is a copy of Appellant's Affidavit to Recuse Judge Moffat. Clearly it went further than Respondent asserts.

CONCLUSION

The trial court in this case grossly abused its discretion in both evidentiary matter and matters of law. As a result, the case should be reversed and dismissed or a new trial should be granted.

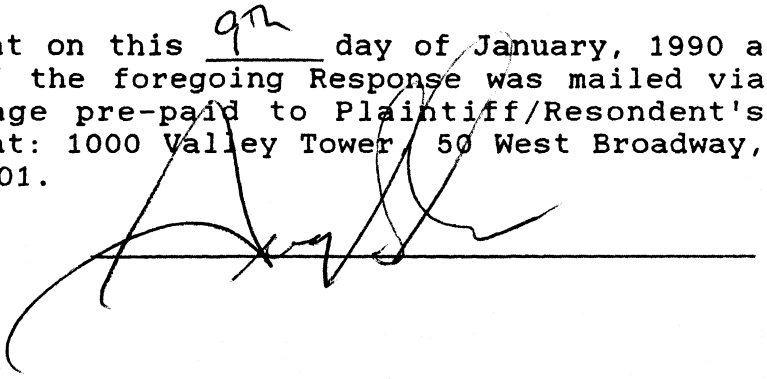
Further, Appellant should be awarded his cost and attorney's fees incurred as a result of this appeal.

DATED this 9th day of January, 1990.

GREG S. ERICKSEN
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify that on this 9th day of January, 1990 a true and correct copy of the foregoing Response was mailed via first class mail, postage pre-paid to Plaintiff/Resondent's attorney, Robert Hughes at: 1000 Valley Tower, 50 West Broadway, Salt Lake City, Utah 84101.



Foxley/BriefII

IN THE THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

DEANNA FOXLEY,
Plaintiff,

vs.

WILLIAM M. FOXLEY,
Defendant.

CHILD SUPPORT OBLIGATION WORKSHEET
(SOLE CUSTODY)

Civil No. D82 1591

AVAILABLE INCOME		Plaintiff	Defendant	Combined
Gross Monthly Income		1a 590.00	1b 8,333. (+)	
Pre-Existing Alimony or Child Support Orders You Have Paid		2a 0	2b 0	
Adjusted Gross Income (#1a - #2a = #3a, #1b - #2b = #3b, #3a + #3b = #3c)		3a 590	3b 8,333	3c 8,923.00
Proportionate Share of Combined Income (#3a ÷ #3c = #4a, #3b ÷ #3c = #4b)		4a .07 %	4b .93 %	
CHILD SUPPORT NEED				
Age Group		0 - 6	7 - 15	16 - 18
Number of Children per Age Group (#5a + #5b + #5c = #5d)		5a 1	5b 2	5c 0 — 5d 3
Schedule Amount per Child (use the combined adjusted gross income from #3c and the schedule appropriate to the total number of children in #5d)		6a 578	6b 710	6c 0
Total Amount (#5a x #6a = #7a, #5b x #6b = #7b, #5c x #6c = #7c, #7a + #7b + #7c = #7d)		7a 578	7b 1420	7c 0 — 7d 1,998.00
Work-Related Child Care Costs				8 0
Health and Dental Insurance Premiums For Children				9 0
Total Support Need (#7d + #8 + #9 = #10)				10 1998.00
CHILD SUPPORT OBLIGATION				
Share of Obligation (#4a x #10 = #11a, #4b x #10 = #11b)		11a 139.00	11b 1858.14	
Credit for Actual Payments in #8 and #9		12a 0	12b 0	
Parent's Total Child Support Obligation (#11a - #12a = #13a, #11b - #12b = #13b)		13a 139.00	13b 1858.14	

The extended visitation amount applies only to the non-custodial parent and to those months in which the order specifies that the child spend at least 25 of 30 consecutive days with that parent.

Amount Paid During Extended Visitation (#13a x .75 = #14a, #13b x .75 = #14b)	14a	14b	

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DEANNA FOXLEY, Plaintiff, vs. WILLIAM N. FOXLEY, Defendant.	AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW CIVIL NO. D82-1591 JUDGE RICHARD H. MOFFAT

THIS MATTER came on for trial on September 22, 1988, at the hour of 2:00 p.m. and was subsequently continued to March 7, 1989 at the hour of 10:00 a.m. on Plaintiff's Petition to Modify a Decree of Divorce before the Honorable Richard H. Moffatt, Judge of the above-entitled Court, sitting without jury. The Plaintiff, Deanna Foxley, was represented by Robert W. Hughes and the Defendant, William N. Foxley, was represented by Greg S. Ericksen.

The Court having heard testimony and received evidence, argument to the Court having been made, and the Court being fully advised in the premises is now prepared to enter its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Plaintiff and the Defendant were married October 8,

1976. At the time of the marriage, the Plaintiff was an undergraduate student and the Defendant was a graduate student at Boise State University.

2. The divorce trial was heard on June 30, 1983, a Decree of Divorce was signed on August 22, 1983 and entered on August 23, 1983 to become final three months from the time of entry.

3. At the time of the divorce, the Plaintiff was unemployed and had no income and the Defendant was a student and had an income, not including amounts received from student loans, of approximately $50.00 per month.

4. That at the time of the divorce, the Plaintiff had expenses of $1,070.00 per month, the Defendant had expenses of $895.00 per month.

5. The Defendant graduated from the University of Utah Medical School in June of 1983.

6. During the parties marriage the parties had four minor children to wit: Christine, born September 19, 1970. (Christine was the daughter of the Plaintiff by a prior marriage who was adopted by the Defendant in October of 1980.); Sarah, born May 23, 1977; Noall, born July 13, 1979; and Corinne, born April 15, 1982.

7. During the marriage, the Plaintiff could not pursue her formal education due to frequent relocations of the Defendant in pursuing his medical career, because Plaintiff was employed at

various times during the marriage to assist in the support of the family, and due to the fact that Plaintiff was pregnant for a major portion of the time.

The parties acquired few household furnishings, appliances or other personal property during the marriage.

8. For approximately the two years after the parties were divorced, the Plaintiff and the parties minor children required and received public assistance.

9. The Court finds that the Plaintiff has done an admirable job of caring for and educating the parties minor children.

10. The Court finds that the Plaintiff and the minor children have endured substantial hardships since the time of the divorce.

11. The Court finds that the Plaintiff has made significant personal sacrifices to further her education since the time of the divorce. After the divorce, Plaintiff obtained her bachelors degree in Sociology and expects to receive her masters degree in 1989. Plaintiff anticipates pursuing a Ph.D. Length of time for completion of this course of study will depend on course requirements.

12. The Plaintiff intends to continue with her education in an effort to maximize her income potential. The testimony and evidence admitted at trial indicates that the prospects of the Plaintiff finding well-paid and full-time employment in her field will be difficult without additional education and that even with

additional education, employment opportunities are projected to be limited in the future.

13. During the year 1987, the Plaintiff worked as a part-time employee and had a gross income of $9,600.00.

14. In 1987, the Defendant moved to Winslow, Arizona where he is the only medical doctor who specializes in obstetrics and gynecology in that vicinity.

15. During the year 1987, the last year which the Defendant was able to provide a tax return, the Defendant had a gross income of $128,437.00. The Defendant's 1987 income was comprised of wages he received $16,031.00 as an employee, for approximately 6 months, at the Huerly Medical Center in Michigan, and from the private practice of medicine. The Defendant earned $112,406.00 from his private medical practice in approximately 6 months of practice.

16. The earnings of the Defendant as well as his future potential have been considered by the court for the purpose of determining whether the amount of alimony should be modified.

17. The Defendant's present income is not completely clear but the Court finds based upon the evidence that his gross income can be interpreted as being as high as $224,000.00 a year but certainly under no circumstances less than approximately $120,000.00 per year.

18. The Defendant was able to contribute $41,660.00 to a Keogh Retirement Plan in 1987 and he anticipated contributing a similar amount to a retirement plan in 1988.

19. The Court finds that there has been a substantial change of circumstances in the parties income since the time of the divorce.

20. Based upon the changes of circumstances, a modification of the decree of divorce is warranted. The Court does not, however, find it necessary to invoke the theory of "Equitable Restitution" as annunciated by the Utah Courts of Appeals nor is it necessary to the Court to invoke the provisions of the original divorce decree, wherein Judge Condor awarded an interest in the Defendant's medical degree to the Plaintiff, since the change of circumstances and the needs of the Plaintiff and the minor children are sufficient to justify a modification of the decree.

21. Based upon the change of circumstances and the needs of the children, child support to be paid by the Defendant should be increased to the appropriate amount reflected in the judicial district's support guidelines.

22. The Court finds that the Plaintiff has an adjusted gross part-time income of $800.00 per month and that the Defendant has an adjusted gross income, after the subtractions of his minimum necessary expenses, in excess of $6,985.00 per month.

23. The proportionate share of the parties combined income is 10% and 90% for the Plaintiff and the Defendant respectively.

24. The Court finds that based upon the Plaintiff's and Defendant's combined adjusted gross incomes, the amount of child support per child should be the sum of $607.00 per month for the

minor children Sarah and Noall and should be the amount of $504.00 for the parties youngest child, Corinne, for a total child support amount of $1,718.00, monthly, for all three minor children. The Defendant, pursuant to the support guidelines, should pay to the Plaintiff the sum of $1,549.00 for child support. The Court further finds that the amount of child support for Corinne should increase to the sum of $607.00 per month beginning on April 15, 1989, since she will be 7 years of age on that date. Therefore, beginning on April 15, 1989, the Defendant's child support obligation will increase to $1,638.00 per month, $546.00 per month per minor child.

25. The Court further finds that pursuant to the support guidelines, the child support to be paid by the Defendant to the Plaintiff should be decreased by 25% during those periods which the Defendant has extended visitation of 25 consecutive or more days with the minor child(ren).

26. The Court finds that at the time of the hearing the Plaintiff was in arrears in property taxes for her residence in excess of $3,000.00 and that the Plaintiff's residence was in jeopardy of being sold by the county for back property taxes; that the Plaintiff is nine payments behind on her mortgage payments; that the Plaintiff has incurred substantial debts for medical, dental and orthodontic expenses for the children; that the home where the Plaintiff and the minor children reside is in poor condition and is in need of substantial and major repairs, including repairs to the roof, foundation, interior and exterior

walls and plumbing, rebuilding of the back entry into the home, as well as other repairs; and, that the Plaintiff and the children are in need of new appliances and household furnishings, including beds, furniture, a washer and dryer, a stove and also new clothing and shoes.

The Plaintiff is currently living in the same home as when the Decree was entered.

27. The Court finds that at the time of the modification hearing, there has been a substantial change in circumstances of the parties, that the Plaintiff has a real and substantial need for an increase in alimony and that she has endured substantial and significant personal hardships since the time of the divorce.

28. The Court finds that it is just and equitable that the monthly alimony to be paid by the Defendant to the Plaintiff should be increased from $10.00 to the sum of $1,350.00 per month. Payment of alimony to commence as of April 19, 1989.

29. The Court further finds that the Defendant should be required to provide health and dental insurance for the minor children of the parties. The Court further finds that it is equitable and just that any medical or dental expenses, including orthodontic expenses, not paid by health and dental insurance should be divided equally between the parties.

30. The Court finds that attorney's fees should be awarded to the Plaintiff in this case and that a reasonable attorney's fees would be the sum of $4,394.00 plus her costs incurred herein.

31. The Court finds that that the Plaintiff's Counsel's fees were charged at the rate of $60.00 per hour, and considering the length of time expended and the complexities of the issues, the above award of attorney's fees is reasonable.

32. That the Court did not consider whether alimony should be terminated but would entertain further hearing upon application of either party or future petitions for modification.

CONCLUSIONS OF LAW

1. There has been a substantial change of circumstances since the Decree of Divorce was originally entered in this matter.

2. It is fair and reasonable, based upon the change of circumstances, that the amount of child support to be paid by the Defendant should be increased in accordance with the schedules set forth in the child support guidelines.

3. The child support to be paid by the Defendant to the Plaintiff for support of the parties minor children should increase to the amount of $1,549.00 per month for the three minor children. The amount of child support to be paid by the Defendant to the Plaintiff for the support of the parties minor children should be increased to the amount of $1,638.00 per month, $546.00 per child per month, beginning April 15, 1989.

4. The Plaintiff has endured and continues to endure significant and substantial hardships and has made significant and substantial sacrifices since the time of the divorce and she

has a significant and substantial need at present and in the future for an increase in alimony.

5. It is fair and reasonable that the amount of alimony payable from the Defendant to the Plaintiff be increased to $1,350.00 per month, commencing April 19, 1989.

6. The Defendant should provide health, accident and dental insurance for the parties minor children and any medical and dental costs, including orthodontic treatments, which are not paid by medical insurance shall be divided equally between the parties.

7. It is just and reasonable that the Plaintiff be awarded attorney's fees in the amount of $4,394.00 plus costs incurred herein.

DATED this 6th day of July, 1989.

BY THE COURT

RICHARD H. MOFFAT
DISTRICT COURT JUDGE

APPROVED AS TO FORM:

Robert W. Hughes
Attorney for Plaintiff

Greg S. Ericksen
Attorney for Defendant

MISC:Foxley

GREG S. ERICKSEN - 1002
Attorney for Defendant
1065 South 500 West
Bountiful, Ut 84010
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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DEANNA FOXLEY, Plaintiff, vs. WILLIAM M. FOXLEY, Defendant.	AFFIDAVIT OF GREG S. ERICKSEN JUDGE RICHARD H. MOFFAT CIVIL NO. D82-1591

COMES NOW Greg S. Ericksen Attorney at Law who in support of Defendant's motion to disqualify, and after being placed under oath deposes and says as follows:

1. That he is the Attorney of record for Defendant and is familiar with this matter.

2. That certain situations have arisen in the matter and that Defendant has the opinion that the Judge assigned to this case has demonstrated a bias that would prevent him from having a fair hearing and has directed me to seek another Judge to hear issues involved herein.

3. That the case at bar involves the following general issues:

A. Plaintiff has petitioned the Court for a Modification of the Divorce Decree, requesting an increase in child support and alimony.

B. That Defendant has asserted Plaintiff is in

EXHIBIT C

contempt of court for willful refusal to allow him visitation of his children and for intentional interference of his visitation rights.

4. That at a prior hearing in this matter, Judge Richard Moffat upon his own motion interviewed the children of the Parties in camera and made a suggestion that Defendant was largely responsible for visitation problems as he did not spend time with his children and that if he didn't spend time, that the Court may well limit his visitation. Said remarks were made without a full evidentiary hearing on the matter.

5. That Defendant is a physician practicing medicine out of state and has done so for the last six or seven years.

6. That the crux of Defendant's pleadings and petitions to find Plaintiff in contempt was that every year Defendant would set aside time to visit his children due to the fact that he is a physician and out of state. Defendant alleges that every year Plaintiff would willfuly refuse to let the children visit the Defendant during this vacation time and that he would have to petition the Court and that by the time he received the children for visitation, his vacation period had run its course and that visitation had to take place around a different schedule. Further, Defendant has alleged and will offer testimony that Plaintiff has withheld gifts and cards he has sent to this children and has refused to let Defendant talk to his children by phone when he calls.

7. For this and other reasons, Defendant has filed a petition requesting the Court to find Plaintiff in contempt for

intentional interference with visitation and interaction between he and his children.

8. That on June 6, 1988, Defendant sent a letter to Plaintiff requesting visitation during July 11, 1988 through August 15, 1988.

9. That approximately three days prior to the designated time for visitation, I received a call from Plaintiff's attorney advising me that unless Defendant agreed to shorten his visitation to 3 weeks that Plaintiff would not let the children go based on the fact that Judge Moffat had suggested that visitation may be shortened if Defendant didn't agree to spend more time with his children.

10. That Dr. Foxley was again faced with not having his vacation time to visit with his children.

11. As a result, on July 11, 1988 at the hour of 1:00 p.m., the day set for visitation, counsel for Plaintiff and myself placed a conference call to Judge Moffat regarding visitation.

12. That as I recall, the conversation, Judge Moffat informed Plaintiff's counsel that he would not limit visitation, but that if Defendant did not spend time with the children that he may order them home.

13. That the children left to visit with Defendant on or about July 13, 1988, two days after visitation was to commence.

14. That during the week of August 1, 1988 or approximately during that time, I received a call from Robert Hughes, Plaintiff's counsel, requesting that the youngest child be returned home because she was homesick.

15. That after talking with Dr. Foxley, I advised Plaintiff's counsel that my client had advised me that things were going great and that the only problem was that Plaintiff had told the children that they only had to stay for three weeks and that Plaintiff wanted the children to go to Montana with her prior to the end of five weeks that Defendant had the children.

16. That I was out of the state the week of August 8, 1988.

17. That on or about August 9, 1988, I received a call from my office informing me that Plaintiff's attorney was going to have a hearing on August 10, 1988 to get a court order, ordering the children immediately returned.

18. That on August 9 and August 10, I tried to call Plaintiff's counsel but could not reach him, whereupon I spoke with Judge Moffat and registered my objection to such a hearing. Judge Moffat informed me that he would not have time to hear such a motion prior to his leaving for vacation on August 12, 1988, and that he would not sign an order.

19. On August 11, 1988, I was informed by my office that Plaintiff's counsel had called and that the Judge had agreed to sign an order for immediate return of the children.

20. Upon contacting Plaintiff's counsel, he confirmed what my office had told me, whereupon I advised him that in my view such an order was inappropriate and that I was shocked to learn that Plaintiff and his client had visited with the Judge concerning the matter.

I informed him that I intended to file an appeal.

21. That I received a massage from my office that Judge

Moffat was upset and would find me personally in contempt and wanted me in his office first thing Friday morning, August 12, 1988.

22. That I unsuccessfully tried to reach the Judge and informed his clerk that it was impossible for me to get back to Salt Lake before Saturday, August 13.

23. That the following week of August 15, I spoke with Plaintiff's attorney who advised me that he was not going to pursue the contempt issue.

I advised him that the children would be home on August 17, 1988.

DATED this 6th day of September, 1988.

Greg S. Ericksen
Attorney for Defendant

The undersigned being a Notary Public does hereby certify that on this 6th day of September, 1988 personally appeared before me GREG S. ERICKSEN, who executed the foregoing Affidavit.

NOTARY PUBLIC
Residing at: Davis County

My commission expires:

12-9-90

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Deanna Foxley	:	
Plaintiff,	:	MINUTE ENTRY
vs.	:	
William M. Foxley	:	CIVIL NO. D82-1591
Defendant.	:	

The Court having received the Amended Affidavit of Greg S. Ericksen the attorney for the defendant in the above entitled matter and his Certificate of Counsel all pursuant to rule 63B of the Utah Rules of Civil Procedure and having considered same finds that the amended affidavit is insufficient in law as well as in fact and declines to recuse himself from the hearing in the above entitled matter. The undersigned states that he in no way biased or prejudiced for or against either of the parties in said matter and feels that the defendant has misunderstood some of the pronouncements of the Court or some of the rulings of the Court. In addition the problem that arose regarding the visitation during the first week of August, 1988, which ended with an exparte order being granted has not been accurately reported to defense counsel and his statements regarding the Courts attitude in regard

EXHIBIT D

to that matter are inaccurate.

Dated this 20 day of September, 1988.

Richard H. Moffat
District Court Judge